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Public Prosecutor v Lee Wei Chin & Anor

B HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 42H-11–05 OF 2017
COLLIN SEQUERAH J
21 DECEMBER 2017

C *Criminal Procedure — Appeal — Appeal against sentence — Respondents charged under s 395 of the Penal Code read with s 397 of the Penal Code — Respondents pleaded guilty — Sessions court judge sentenced respondents to two years imprisonment from date of arrest — Whether sentence imposed manifestly inadequate — Penal Code ss 395 & 397*

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On 12 April 2017, while the complainant was on duty as cashier at Night City, Johor Bahru, the respondents approached the complainant with a knife and ordered him to hand over some money. The complainant was scared and
E promptly handed over the sum of RM200 to the respondents. The complainant subsequently lodged a police report and acting on the said information, a team of police detained the respondents. The respondents were charged at the sessions court under s 395 of the Penal Code ('the Code') read together with s 397 of the Code. After the charge was read, the respondents
F pleaded guilty to the offence and consequently, the learned sessions court judge ('the SCJ') imposed a period of two years imprisonment from date of arrest on both respondents. Dissatisfied with the sentence imposed, the public prosecutor ('the appellant') filed the present appeal. The appellant submitted that the sentence passed was manifestly inadequate.

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Held, setting aside the sentence of imprisonment of two years passed by the SCJ, replacing it with the sentence of imprisonment of seven years for both respondents and five strokes of whipping only in respect of the first respondent:

H (1) The offence committed was of serious in nature and this was reflected by the maximum sentence prescribed. The fact that only RM200 was the subject matter involved did not mean that the offence could be treated as trivial in nature. The ordeal and trauma that the victim must had gone through when placed in fear of his life by being confronted with a knife ought to be considered. The SCJ was too swayed by the fact that both
I respondents were first offenders and had pleaded guilty. This did not outweigh the severity of the offence. The sentence of two years imprisonment passed by the SCJ did not therefore adequately reflect the severity of the offence and under the circumstances was manifestly low (see paras 15–18).

(2) Under the circumstances, it was clear that the SCJ had erred in not imposing whipping. The SCJ failed to take into account the public interest element when passing the sentence. Based on the above findings, the court was entitled to interfere with the sentence passed by the SCJ (see paras 22–24).

(3) Based on s 289 of the Criminal Procedure Code, no whipping was imposed on the second respondent being a female (see para 26).

[Bahasa Malaysia summary

Pada 12 April 2017, semasa pengadu bertugas sebagai juruwang di Night City, Johor Bahru, responden-responden mendekati pengadu dengan pisau dan menyuruh pengadu menyerahkan wang. Pengadu ketakutan dan dengan cepat menyerahkan wang berjumlah RM200 kepada responden-responden. Pengadu kemudiannya membuat laporan polis dan bertindak atas maklumat tersebut, sepasukan polis menangkap responden-responden. Responden-responden dituduh di mahkamah sesyen di bawah s 395 Kanun Keseksaan ('Kanun') dibaca bersama-sama dengan s 397 Kanun. Selepas tuduhan dibacakan, responden-responden mengaku bersalah kepada kesalahan dan akibatnya, hakim mahkamah sesyen yang bijaksana ('HMS') mengenakan tempoh dua tahun penjara dari tarikh tangkapan ke atas kedua-dua responden. Tidak berpuas hati dengan hukuman yang dikenakan, pihak pendakwaan ('perayu') memfailkan rayuan ini. Perayu berhujah bahawa hukuman yang dijatuhkan adalah tidak mencukupi.

Diputuskan, mengetepikan hukuman penjara dua tahun yang dijatuhkan oleh HMS, menggantikan dengan hukuman penjara tujuh tahun untuk kedua-dua responden dan lima sebatan bagi responden pertama:

(1) Kesalahan yang dilakukan adalah serius dan ini dibuktikan oleh hukuman maksimum yang ditetapkan. Fakta hanya RM200 adalah perkara yang terlibat tidak bermaksud bahawa kesalahan boleh dianggap sebagai bersifat remeh-temeh. Pengalaman pahit dan trauma yang mangsa lalui tentang ketakutan nyawanya diancam apabila berhadapan dengan pisau patut dipertimbangkan. HMS terlalu terpengaruh dengan fakta bahawa kedua-dua responden adalah pesalah pertama dan telah mengaku bersalah. Ini tidak mengatasi betapa teruk kesalahan tersebut. Hukuman dua tahun penjara yang dijatuhkan oleh HMS oleh itu tidak secara mencukupi membayangkan betapa teruknya kesalahan tersebut dan di bawah keadaan adalah telalu sedikit (lihat perenggan 15–18).

(2) Di bawah keadaan, ia adalah jelas bahawa HMS telah tersilap kerana tidak mengenakan sebatan. HMS gagal untuk mengambil kira unsur kepentingan awam semasa menjatuhkan hukuman. Berdasarkan dapatan di atas, mahkamah berhak untuk campur tangan hukuman yang dijatuhkan oleh HMS (lihat perenggan 22–24).

(3) Berdasarkan s 289 Kanun Tatacara Jenayah, tiada sebatan dikenakan ke atas responden kedua, kerana seorang wanita (lihat perenggan 26).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 506–575.

Cases referred to

Ahmad Najmi Musaiyar Ahmad Noor v PP [2016] MLJU 1875; [2016] 1 LNS 134, HC (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Muhamad Elias bin Muhamed Yusoff v PP [2016] 12 MLJ 306; [2016] 8 CLJ 723, HC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)

Legislation referred to

Criminal Procedure Code s 289
Penal Code ss 395, 397

Chan Lee Lee (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Mohd Tarmeze bin Mohd Taib (Tarmeze & Assoc) for the respondents.

Collin Sequerah J:

INTRODUCTION

[1] Both the respondents were charged before the Sessions Court at Johor Bahru for the following:

Charge

Bahawa kamu pada 12/04/2017 jam lebih kurang 0005Hrs bersama-sama Yap Huay Chee, KPT: 96040801-508 Di premis Nights City, No 18-01, Jalan Sagu 30, Taman Daya, Di Dalam Daerah Johor Bahru , Di Dalam Negeri Johor Darul Takzim, telah melakukan kesalahan merompak dengan menggunakan senjata terhadap Kyaw Min Soe, N/Passport MA445009. Oleh yang demikian itu kamu telah melakukan satu kesalahan yang boleh di hukum dibawah Seksyen 395/397 Kanun Keseksaan.

[2] After the charge was read, both respondents pleaded guilty. The learned sessions court judge ('SCJ') imposed a period of imprisonment of two years from date of arrest on both respondents.

[3] The public prosecutor has now appealed against the term of imprisonment passed on both respondents.

FACTS OF THE CASE

[4] The pertinent facts of the case reveal that on 12 April 2017 at around 12.05pm while the complainant was on duty as cashier at Night City at No 18-1, Jalan Sagu 30, Taman Daya, Johor Bahru, both respondents who were ex-workers at Night City approached the complainant with a knife and ordered him to hand over some money.

[5] The complainant, was scared and promptly handed over the sum of RM200 in cash to the respondents who then fled the scene. The complainant lodged a police report Setia Indah 3554/2017 pertaining to the incident.

[6] Acting upon information, a team of police detained both the respondents on 13 April 2017 at room No 305, Hotel 91, No 43 and 45, Jalan Sagu 33, Taman Daya, Johor Bahru. An arrest report Setia Indah 3612/2017 was lodged.

[7] Investigations revealed that the complainant was known to both respondents as they were ex-workers at the said Night City.

PRINCIPLES REGARDING SENTENCING

[8] The aspect of sentencing by the courts has been admirably set out by Hashim Yeop A Sani J (as he then was) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 as follows:

> In respect of sentencing there can be only general guidelines. No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.

[9] The passage cited above indicates that the process of sentencing is very much fact sensitive and this fact necessarily endows the court carrying out this function with some measure of discretion within permissible limits.

[10] Having said that however, it has long been established that one of the foremost considerations in sentencing is that of the public interest. This fact was also not lost upon the learned judge in *Public Prosecutor v Loo Choon Fatt* who went on to hold as follows:

> *One of the main considerations in the assessment of sentence is of course the question of public interest.* On this point I need only quote a passage from the judgment of Hilbery J in *Rex v Kenneth John Ball* 35 Cr App R 164 as follows:

> *In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest*. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. *A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living*. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. *Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe*. (Emphasis added.)

[11] The principles with regard to appeals in respect of sentence were set out by the Federal Court in the case of *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83, as follows:

> *As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description?* I have had occasion to say elsewhere, that *the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred*. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525 at 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. *Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.*
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> *For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion*. (Emphasis added.)

[12] It can be seen that judges are vested with a wide discretion in the matter of sentencing. The principles guiding courts hearing an appeal against sentence is also encapsulated in the foregoing passages.

ANALYSIS AND DECISION

[13] Both respondents were charged under s 395 of the Penal Code read together with s 397 of the same Code. These sections reads as follows:

> 395 Punishment for gang-robbery
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> Whoever commits gang-robbery shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.
>
> 397 Robbery when armed or with attempt to cause death or grievous hurt
>
> If at the time of committing or attempting to commit robbery, the offender is armed with or uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, such offender shall be liable to be whipped, in addition to any other punishment to which he may be liable under any other section of this Code.

[14] The submission advanced by the learned deputy public prosecutor ('DPP') took the form of persuading this court that the sentence passed by the SCJ was manifestly inadequate.

[15] The first observation to make in light of this submission is that the imprisonment term may extend to 20 years under s 395. The offence committed is of a serious nature. This is reflected by the maximum sentence prescribed.

[16] The fact that only RM200 was the subject matter involved as contended by learned counsel for the respondents, does not mean the offence can be treated as trivial in nature. The ordeal and trauma that the victim must have gone through when placed in fear of his life by being confronted with a knife must be also considered.

[17] The learned sessions court judge (SCJ) was too swayed by the fact that both respondents were first offenders and had pleaded guilty. This did not outweigh the severity of the offence.

[18] The sentence of two years imprisonment passed by the learned SCJ did not therefore adequately reflect the severity of the offence and under the circumstances was manifestly low.

[19] The respondent was armed with a knife during the commission of the crime. The provision in s 397 also mandates whipping if at the time of committing the robbery the offender is armed with or uses any deadly weapon or causes grievous hurt or attempts to do so. The specific words employed in s 397 are 'shall be liable to be whipped'.

[20] The DPP cited the case of *Muhamad Elias bin Muhamed Yusoff v Public Prosecutor* [2016] 12 MLJ 306; [2016] 8 CLJ 723 where it was held:

> In the premises *save and unless s 294 of the Criminal Procedure Code is invoked*, which is not the case here, *it is plain that the phrase 'shall be liable to whipping/be whipped' in ss 392 and 397 respectively connotes mandatory whipping*: see *Public Prosecutor v Man bin Ismail* [1939] MLJ 207 that was approved by the Federal Court in *Jayanthan v Public Prosecutor*. The sessions court was therefore not in error at all in having imposed whipping on the appellant. (Emphasis added.)

[21] In *Ahmad Najmi Musaiyar Ahmad Noor v Public Prosecutor* [2016] MLJU 1875; [2016] 1 LNS 134, it was held:

> Hukuman bagi kesalahan di bawah s 395 Kanun Keseksaan adalah penjara sehingga boleh selama 20 tahun dan boleh dikenakan sebatan. Sekiranya semasa melakukan kesalahan rompakan, senjata yang boleh mendatangkan maut digunakan maka wajib dijatuhkan hukuman sebatan sebagaimana yang di peruntukkan di bawah s 397 Kanun Keseksaan.

[22] It is therefore clear that under the circumstances, the SCJ had erred in not imposing whipping. It is the duty of this court to set that right. The learned DPP cited several cases that reflected the trend of sentencing for similar offences where the offenders had claimed pleaded guilty. The process of sentencing however involves the exercise of discretion and therefore no two cases ought to be treated alike.

[23] A perusal of the grounds of judgement by the SCJ showed that he had failed to take into account the public interest element when passing the sentence. In this respect he had erred in principle as it is trite that public interest is the first and foremost consideration in sentencing. See *Public Prosecutor v Loo Choon Fatt*.

[24] This omission on the part of the SCJ and the other reasons explained aforesaid including the fact that under the circumstances the sentence passed was manifestly low, entitled this court to interfere with the sentence passed by the SCJ.

[25] In the premises the sentence of imprisonment of two years passed by the SCJ is set aside and replaced by a term of imprisonment of seven years for both respondents.

[26] In respect of the first respondent only, a sentence of whipping of five strokes is also imposed. No whipping is to be carried out on the second respondent being a female. See s 289 of the Criminal Procedure Code.

Imprisonment sentence of two years passed by SCJ set aside and replaced with seven years imprisonment for both respondents and five strokes of whipping only in respect of first respondent.

Reported by Dzulqarnain Ab Fatar